92-387

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE,
DAVID HICKS, JOE HENRY CRUTCHER,
and WANDA LUFFMAN,

Petitioners,

v.

ALLEN D. HEFLIN, and wife
JEAN LaRUE HEFLIN, and
RUE ELLEN HEFLIN, next of kin
and survivors of
HUGH ALLEN HEFLIN, Deceased,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

EMIL F. SODORO, #13935
SODORO, DALY & SODORO
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
Tel: (402) 397-6200

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not a dead person who has committed suicide has a constitutional right to have his body cut down immediately upon discovery?

2. Whether or not a pre-discovery summoning of emergency medical help constitutes constitutionally-adequate medical care?

3. Whether or not jail officers can be "deliberately indifferent" to the medical needs of a prisoner, when:

   a) The prisoner is already dead?

   b) The jail officials summoned emergency medical help *before* discovery of the body?

4. Whether or not, if there is any right extant for a suicide victim in excess of that to have emergency medical help summoned immediately upon discovery, such a right was "sufficiently particularized," in "clearly-established" "pre-existing" case law, that a reasonable jail official would have known of it?

5. Whether or not a non-qualified expert may give testimony containing legal conclusions?

6. Whether or not the facts were misperceived in the opinion below?

7. Whether or not the result below:

   a) Calls for an exercise of this Honorable Court's power of supervision because it departs from the usual and accepted course of judicial proceedings?

QUESTIONS PRESENTED FOR REVIEW–Continued

b) Conflicts with decisions of the United States Supreme Court?

c) Conflicts with the decisions of other federal circuit courts of appeal?

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

1. *Heflin et al. v. Stewart County, Tennessee et al.*, 958 F.2d 709 (6th Cir. 1992).

2. *Heflin v. Stewart County, Tennessee*, ___ F.2d ___, 1992 WL 163477 (6th Cir. 1992) (partial modification upon Petition for Rehearing).

JURISDICTIONAL STATEMENT

The date of the original opinion in this case issued by the Court below is March 9, 1992. Rehearing en banc was denied June 3, 1992.

The Petition for Rehearing per se was denied (except for a partial modification) on July 1, 1992.

The statutory provision which confers jurisdiction upon the Supreme Court to review this matter by Writ of Certiorari is found at 28 U.S.C. § 1254; also by S.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

1. U.S. Const. Amend. XIV.

2. 28 U.S.C. § 1254.

3. S.Ct. Rule 10.

4. Fed. R. Evid., Rule 701.

5. Fed. R. Evid., Rule 704.

6. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Respondents' decedent, Hugh Allen Heflin, on or about September 3, 1987 (1 Trial Transcript at 144:24, et seq.), did decide to and did commit suicide by hanging himself in his jail cell (R1: Original Complaint at paragraph 24). He did so at the Stewart County Jail in Dover, Tennessee.

Respondents freely admit this. In their original Complaint, they state:

> Between the hours of 11:15 a.m. and 12:06 p.m, Plaintiffs' decedent tore sections of his bed sheet. Plaintiffs' decedent climbed to the top of his cell's shower stall while the water was running to disguise the noise of his activity. He proceeded to fashion a noose around his neck from the bed sheet strips and to tie his hands and feet together with segments of the bed sheet. Plaintiffs' decedent placed a wash cloth or towel in his mouth, all of these measures apparently aimed at prevention of self rescue and/or detection. Plaintiffs' decedent then jumped from the top of the shower stall, causing his death by strangulation.

See, R1: Original Complaint at paragraph 24.

These careful preparations by the decedent irrefutably demonstrate that the suicide act was carefully conceived and elaborately carried out, with a significant part

of the preparations given over to the purposes of accomplishing the avoidance of detection and of self-rescue.

Notwithstanding, Respondents demand compensation, essentially focusing upon the novel proposition that additional medical emergency care should have been rendered to one who was already dead, and who was determined to be so, first by the deputy sheriff who discovered the decedent, and then by each successive medical professional who entered the cell (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17).

It is undisputed and without contradiction in the record before the Court that the first jail official to learn of a potential medical emergency, Deputy Sheriff Larry Joe Crutcher, *did immediately* summon emergency medical help (1 Trial Transcript at 149:17-19), *even before* he ascertained that there was an actual medical emergency (1 Trial Transcript at 148:2-22). Emergency medical help arrived promptly (2 Trial Transcript at 201:15-202:2), consisting of two paramedics (2 Trial Transcript at 201:15-202:2) who performed an examination upon the body (2 Trial Transcript at 202:3-6, 223:1-14). Dr. Lee arrived shortly thereafter (2 Trial Transcript at 206:10-17).

While waiting for the emergency medical help, which Deputy Sheriff Crutcher had summoned prior to the definite ascertainment of an actual medical emergency (1 Trial Transcript at 148:2-22), Deputy Sheriff Crutcher also performed a check for vital signs to ascertain whether the suicide was dead (1 Trial Transcript at 153:3-155:16), and

determined that he was (*Id.*). Subsequent to the examination by the paramedics, Dr. Robert Lee examined the suicide and determined that he was dead (1 Trial Transcript at 118:9-17; 119:18-22). Dr. Lee testified that at no time did he hear a heartbeat or see any signs of life in the body (*Id.*).

Deputy Sheriff Crutcher testified that he had no animosity or ill will towards the suicide (2 Trial Transcript at 34:3-11), and that he had never been a problem in the jail (*Id.*).

Sheriff Hicks, Sheriff of Stewart County, Tennessee, also testified that he had no personal ill will or animosity towards the suicide (2 Trial Transcript at 59:6-20). He further testified that he had never been a significant behavior problem (*Id.*). Sheriff Hicks further testified that the emergency paramedics were already in the cell at the time he arrived at the jail in response to the emergency call (2 Trial Transcript at 49:21-23), and that Dr. Lee had not yet arrived (*Id.*). He called the District Attorney's office and asked for an independent investigation (2 Trial Transcript at 49:9-15).

Respondents brought this action in federal district court in the United States District Court for the Middle District of Tennessee, Nashville Division, alleging jurisdiction by virtue of alleged deprivation of alleged constitutional rights.

ARGUMENT

I. AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS REQUIRED BECAUSE THE HOLDING OF THE PANEL BELOW DEPARTS FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS IN THAT IT IS IN CONFLICT WITH OTHER SIXTH CIRCUIT CASES.

The Rules of the Supreme Court of the United States provide, at Rule 10.1(a) thereof, that one of the measuring characteristics for granting certiorari is in an instance where a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This case is such an instance.

The holding by the panel below is in direct conflict with another very recent case, issued by this same Circuit. Such an uneven application of the law can only mean that the Petitioners have not received their constitutional rights of due process and of equal protection.

The rank refusal by the two-judge majority in the panel below to follow the prior holding of the Sixth Circuit case of *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992), is clearly and succinctly demonstrated in the stinging dissent authored by Judge Kennedy. *See, Heflin v. Stewart County, Tennessee*, 958 F.2d 709, 718 (6th Cir. 1992). The two-judge opinion attempts to justify its action by purporting to "distinguish" the facts in *Rich, supra*, from those which were before it. However, and as the dissent, *supra*, clearly sets forth, the facts were not different in any material regard, and an application of the principles of *Rich, supra*, to the facts presented in the

matter now at bar require a similar result, one directly contrary to that reached by the two-judge opinion.

The facts in both *Rich, supra,* and in the matter at bar, in essence focused upon two jail suicides, one unsuccessful and the second, successful. The central focus in both cases, however, was upon the response/reaction by the jail personnel to the medical emergency or potential medical emergency thereby presented. In both matters, plaintiffs effectively claimed that the jail personnel reaction was not "quick" enough. However, the *Rich* Court did not agree.

In *Rich, supra,* the opinion of the Sixth Circuit at 955 F.2d 1095 states that:

> . . . The undisputed facts are that after Detective Murray went through the security doors and discovered Walczak hanging in his cell, he immediately ran to get assistance. He shouted for Officer Yelsky to 'get help' and Yelsky picked up the phone and immediately called the fire department rescue squad. . . .

Id.

The *Rich* Court concluded that the there-defendants "reacted immediately" by seeking assistance. *Id.*, at 955 F.2d 1098. The record in the matter below shows clearly the same *immediate* summoning of medical assistance upon discovery of the suicide. Indeed, the facts in this matter show an *even greater* care and concern for the inmate than did the facts in *Rich, supra.* In *Rich,* help was summoned immediately upon discovery of the inmate hanging in his cell, whereas in this case, Deputy Sheriff Crutcher summoned medical help *even before* he knew

there was an *actual* medical emergency. *See,* 1 Trial Transcript at 118:9-17.

Accordingly, help was summoned and arrived far sooner than it would have had Deputy Sheriff Crutcher merely followed standard procedure. The testimony in the trial below indicates that Deputy Sheriff Crutcher was informed by a jail trusty that the decedent's shower had been running for an unusual length of time (1 Trial Transcript at 147:1-5). Crutcher thereupon investigated and attempted to look into the cell, but was unable to see anything definitive (1 Trial Transcript at 147:24-149:19). Crutcher proceeded to the dispatcher's office (1 Trial Transcript at 149:17-25), grabbed the cell keys (1 Trial Transcript at 150:5-9), and at the same time told one of the employees in the office to "call for an ambulance and the sheriff." (*Id.*).

No greater concern could have been shown for an inmate or his rights, and indeed if Crutcher had only done as he was obligated to do, and not summoned help until after ascertaining with certainty that there was a medical emergency, medical help would not have arrived for quite possibly five or ten more minutes than the time at which it did in fact arrive.

Clearly, conduct which constitutes a higher degree of care rendered to the decedent Heflin than that which was rendered in *Rich, supra,* cannot under any circumstances be "deliberate indifference" and still be a result in accord with *Rich.* (Jail personnel and officials may not be "deliberately indifferent" to the medical needs of their prisoners or pre-trial detainees. *See, Estelle v. Gamble,* 429 U.S. 97 [1976]). There is, then, a prima facie conflict between

the opinion rendered in this case by the two-judge majority, and that rendered in *Rich, supra*. And, as Judge Kennedy noted in her dissent at 958 F.2d 719, there was absolutely no dispute as to the fact that Deputy Sheriff Crutcher did in fact summon medical emergency assistance at that point in time, namely, before he even knew with certainty of a medical emergency.

Respondents, however, as well as the two-judge opinion below, refuse to acknowledge the superiority of the medical care in this case over that rendered in the *Rich* case. They complain that the decedent should have been cut down first, even though he was already dead. However, they are unable to demonstrate the existence of a sufficiently-particularized, clearly-established constitutional right in this regard, existing at the time of the incident so that a reasonable jail official would have known of it.

Nor would the subsequent establishment of such a right change the analysis. The right must have been extant at the time of the suicide, and would have to have been established in case law dealing with it in a sufficiently particularized manner. *See, Cross v. City of Des Moines et al.*, 965 F.2d 629 (8th Cir. 1992); and, *Masters v. Crouch*, 872 F.2d 1248 (6th Cir.), *cert. denied sub. nom.; Frey v. Masters*, 493 U.S. 977 (1989); *Rich, supra*, at 955 F.2d 1097. Such unlawfulness must also have been apparent in light of the pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Rich, supra*, 955 F.2d at 1097.

The discussion found in *Pesek v. City of Brunswick et al.*, ___ F.Supp. ___, 1992 WL 171912 (N.D.Ohio 1992), is also instructive. There, the Court said:

> . . . In making the determination of whether the right was clearly established, the district court must look to decisions of the Supreme Court or those of the Sixth Circuit (citations omitted). Further, the riding question must be a 'particularized' as opposed to a 'generalized' right. The Sixth Circuit has recently discussed this distinction in the following manner:
>
> We recognize that there is no definite guide as to when a right is 'clearly established.' (Citations omitted.) 'The right in question, however, cannot be simply a generalized right, like the right to due process.' (Citations omitted.) The Supreme Court, concerned that the artful pleader could convert the rule of qualified immunity into a rule of virtually unqualified liability by alleging a violation of extremely abstract rights, recently stressed that the right allegedly violated must have been clearly established in a more particularized sense. (Citation omitted.) [For example, see, *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 30, 34, 97 L.Ed.2d 523 (1987).] 'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' (Citation omitted.) Simply put, while official action is not necessarily protected by qualified immunity unless and until the very action in question has been held unlawful, . . . the unlawfulness must be apparent in light of pre-existing law. (Citation omitted.)

Pesek, supra, at pp. 24-25.

Therefore, there was not, in the case law of the United States Supreme Court, the Sixth Circuit, or any other federal circuit, any right of a suicide to be cut down

immediately upon discovery, either apparent in light of pre-existing law, or sufficiently particularized in established case law such that a reasonable official would know of it.

Any subsequent issues which may arguably be present, such as the nature of the medical care rendered by Dr. Robert Lee, is not relevant to and in no way impacts upon the basic fact that medical emergency care was summoned in a way which exceeds and surpasses the requirements of *Estelle, supra*, and of *Rich, supra*. Namely, help was summoned not just immediately upon, *but also prior to* the ascertainment of a definite medical emergency. Those same subsequent issues, even if otherwise valid, also then in no way impact upon nor are they relevant to the bare, stark fact that the manner of summoning medical help in this case *exceeded* that of the manner of summoning medical help in *Rich, supra*. Therefore, the result in this case necessarily is in direct conflict with the result in *Rich*, and an exercise of this Court's power of supervision is called for in order to eliminate this glaring contradiction.

Since, then, the facts of this matter are distinguishable from the facts of *Rich, supra*, but only in these Petitioners' favor, the resulting conflict is constitutionally impermissible. By way of further examples:

The Court in *Rich, supra*, held that a suicide with no vital signs does not have a constitutional right to be immediately cut down. *See*, 955 F.2d at 1097:

> No case has been brought to this Court's attention which recognizes a constitutional duty on

> the part of jail officials to immediately cut down a prisoner found hanging in his or her cell. . . .

Id.

Yet, the result rendered by the two-judge opinion in the panel below is contra. It effectively retroactively requires the Heflin jailers to have immediately cut the Heflin body down upon discovery. *Rich, supra,* expressly found to the contrary. The conflicting holding in this case from the court below may not constitutionally stand.

Also, the partial modification of the opinion below at the time of the Motion for Rehearing does not avoid this problem. That is, absent there being something constitutionally objectionable about the fact that the Heflin body was not cut down immediately upon discovery, there can be no liability. The County is liable only if there was a County policy against cutting down and resuscitating victims. The individual jail personnel are liable only if they acted with deliberate indifference by failing to cut down. But, in light of *Estelle, supra,* and *Rich, supra,* there is nothing per se objectionable about not having cut down immediately upon discovery. Therefore, the modified result, which leaves the County liable for a non-violation, is still fatally flawed.

The Court in *Rich, supra,* also looked to the fact that the officers therein did not intentionally deny or delay the inmate's access to medical care by not cutting him down themselves. The matter before this Court also meets that standard. There was no evidence by Respondents whatsoever that the fact that the decedent's body was not cut down at once upon discovery was in any way intended to deny or delay its access to medical treatment,

and in fact testimony showed that the decedent was, upon discovery, believed to be, and was, dead (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). Since he was believed to be, and was, dead, there could be no intent to deny or delay delivery of medical care. A dead person does not need medical care (even so, it was summoned anyway [1 Trial Transcript at 150:5-9]).

The precedential guidelines of *Rich, supra,* have also been violated by the two-judge holding, in that essentially identical evidence was deemed insufficient to establish a causal nexus in *Rich, supra,* but was deemed sufficient to accomplish the same here. Although strictly speaking, causal nexus was not an issue in *Rich* in precisely the same way as in the matter at bar, nonetheless it was the conduct or lack thereof on the part of the prison officials in *Rich, supra,* which was alleged to have resulted in the alleged injury to the inmate Walczak. So also in the matter at bar, where it is the conduct or lack thereof by the prison officials which is alleged to have resulted in the alleged "injuries" to Respondents' decedent. In *Rich,* the summoning of emergency medical help immediately upon discovery, together with the failure to cut down immediately upon discovery, was alleged to have constituted sufficient causation. The Sixth Circuit rejected that proposition. *See,* 955 F.2d at 1097-1098.

In the matter at bar, the evidence and conduct is even stronger in favor of these Petitioners, since emergency help was summoned *prior to* discovery of a definite medical emergency, and there was *nothing,* as Justice Kennedy put it, "more substantial than a scintilla of hope that there

was in fact a heartbeat and therefore a chance of being resuscitated." *See*, 958 F.2d at 719. Since the decedent was already dead, there could have been no causal nexus between the death and the conduct of the defendants, which in any event was constitutionally compliant and proper.

Additionally, finding that scintilla of hope to be sufficient to justify the result below, necessarily means that the Sixth Circuit violated the rule of *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988), which requires that the evidence be viewed in the light most favorable to the non-moving party. 958 F.2d at 719. *See, also, Lewis v. Jeffers*, 497 U.S. 764 (1990).

In short, in *Rich, supra*, there was a post-discovery, quick summoning of help. There was no intent to delay or to deny help. So also here, where there was a quick summoning, in fact even a *pre-discovery, pre-ascertainment* summoning of medical care, before it was even known for certain that there was an emergency (1 Trial Transcript at 148:2-22). The urgency requirement was met, and the inquiry ends.

Another way in which the result below conflicts with and departs so far from the accepted course of judicial proceedings that it calls for an exercise of this Honorable Court's supervision is the contradiction evidenced by implicit findings of dual liability, namely both individual liability and municipal liability. This problem is unaddressed by the two-judge opinion below, even with the partial modification. The conflict exists by virtue of that opinion's effectively upholding the verdict against the County, necessarily on the basis that a policy had been

established by the County Sheriff of not attempting to cut down and resuscitate attempted suicides. At the same time, it implicitly found the individual actors sought to be charged to have acted with deliberate indifference, something not possible if they were carrying out the County's policy, *supra*.

Yet another way in which the holding below is in conflict with extant Sixth Circuit case law, and therefore constitutes such a departure from accepted judicial procedure as to call for an exercise of this Honorable Court's supervision pursuant to the rules of this Court, is found in the abuse of discretion on the part of the District Court through the wrongful admission of expert penological evidence. Ed Totten, the witness, testified that the Defendants were deliberately indifferent to the medical needs of Respondents' decedent. In *Torres v. County of Oakland*, 758 F.2d 147 (1985), the Sixth Circuit held that testimony couched as a legal conclusion is not "helpful" to the jury so as to comply with Federal Rule of Evidence No. 701. Therefore, such testimony is inadmissible.

While it is true that Rule 704 would permit the testimony if otherwise admissible, the testimony at issue here, the opinion of Totten, was not "otherwise" admissible. As Justice Kennedy observed in her incisive dissent, the testimony did little more than simply try to tell the jury how to decide the case. *Heflin, supra*, at 958 F.2d 719.

Further, the testimony here at issue fails the proper analytical examination as to whether the terms used by the witness have a "separate, distinct and specialized" meaning in the law different from that in the everyday vernacular. *Id.*, at 720. As the dissent observes, just as a

witness is not permitted to testify that a party was negligent, so also an expert cannot be permitted to testify, as here, that a party was "deliberately indifferent." *Id.* In both instances, the terms used have "separate, distinct and specialized" legal meanings, and may not come in as everyday vernacular.

Secondly, the expert witness did not possess any specialized knowledge of the Defendants' mental states so as to be able to assist the trier of fact. He was at most an expert in abstract penological matters. As Justice Kennedy noted, the testimony did more than simply emphasize the opinion of the expert witness as to the seriousness of the conduct of the Defendants, and instead proceeded to also speak to what the expert believed the Defendants' respective states of mind and mental culpabilities in fact were. Given the expert's "impressive" credentials, the jury would be unduly swayed by such an opinion. *Id.*, at 720.

Nor can such error be deemed harmless, in view of the "paucity" of evidence relating to intent, and therefore must be considered highly prejudicial. *Id.*

Because of these blatant and irreconcilable conflicts between the result below and the results of other Sixth Circuit cases, an exercise of this Court's power of supervision is required, to conform the result of this case to that of *Rich, supra,* and the other cases herein.

II. AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS REQUIRED BECAUSE THE HOLDING OF THE PANEL BELOW DEPARTS FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY INACCURATELY PERCEIVING THE FACTS OF THE CASE.

An exercise of this Honorable Court's power of supervision is also called for because the two-judge opinion from the Court below departs grossly from the usual and accepted course of judicial proceedings in that it inaccurately perceives the facts of the case. Once these factual inconsistencies are corrected in light of the record, there remains no basis for the result to stand.

The two-judge opinion at 958 F.2d 717-718 states that in *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992), "[T]he first person to discover the hanging victim went immediately to call for help." *Id.* As we emphasize in this brief, the facts before the Court in this matter *exceed* those of *Rich*. Help was summoned by Deputy Sheriff Crutcher *even before* he knew with certainty there was a medical emergency. He did not even wait to confirm the actuality of the emergency (1 Trial Transcript at 150:5-9), but instead directed that help be summoned at once (*Id.*), even while he was still securing the keys with which to enter the cell to investigate the possibility of a medical emergency (*Id.*). Thus, while the two-judge opinion, *supra*, purports to be in harmony with *Rich*, it is not. If it were, the result reached would have been just the opposite.

The two-judge opinion also states that in *Rich, supra*, there was "no period when responsible officers were doing nothing but waiting for someone else to make the

first move, as in the present case." 958 F.2d at 718. This is a blatant misstatement and is not supported by the record. Indeed, there was *no* point in time when "responsible officers" were waiting for *anyone* to make the "first move." Deputy Sheriff Crutcher, even before ascertainment of a actual medical emergency, summoned help (*Id.*). Upon entering the cell, he examined the body for any signs of life and found none. When help came, in the form of two paramedics, appropriate, routine examinations were made by them. They found no signs of life. When the doctor came, he performed appropriate medical examinations. He found no signs of life. Therefore, no one found any signs or indications of life (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). No time was wasted.

Finally, the two-judge opinion below insinuates that the facts before this Court "present the scenario of the ranking county official present directing that the victim not be cut down until photographs could be taken." 958 F.2d at 718. However, this is a distortion of the actual facts in the record.

The suicide was not cut down, *because he was already dead* (*Id.*). This was confirmed by each individual who examined the body (*Id.*). Since medical care cannot be rendered to a corpse, there was no reason to cut the suicide down until the scene had been properly documented.

Additionally, the two-judge opinion below further departs from the usual and accepted course of judicial

proceedings by its glib transmogrification of the fact that the individual defendants had completed a CPR-type course. That fact does not translate to the existence of a "clearly-established," "sufficiently-particularized" constitutional right (of a dead body to be cut down immediately upon discovery), extant to such a degree that the defendants were required to have known of its existence. *See*, 958 F.2d at 718. The opinion fails to offer any judicial authority whatsoever for this, and indeed there is none for such a novel proposition.

Once these factual misperceptions and distortions are removed, there remains no basis whatever for the result below. Help was summoned even prior to the ascertainment of a medical emergency, each "responsible" person on the scene carried out their tasks at once, and the suicide was not cut down, simply, because he was already dead. Nor does the taking of a CPR-type course create a constitutional right, sufficiently particularized and "clearly established" such that it would be known by a reasonable jail official. In the absence of these inaccuracies, the record shows absolutely no constitutional deprivation, and there is no basis for liability.

III. THE RESULT BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The result emanating from the two-judge opinion in the court below also directly conflicts with decisions of this Honorable Court on similar issues.

For instance, in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), this Court held that whatever standard might otherwise be applicable, the City had fulfilled its constitutional obligation by seeing that the inmate was taken promptly to a hospital that provided appropriate treatment for his injury. *See*, 463 U.S. at 245, 103 S.Ct. at 2983. Here, the law enforcement official, Deputy Sheriff Crutcher, summoned emergency medical help *even before* it was known with certainty that there was an actual medical emergency.

Yet, the result of the two-judge opinion below ignores this compliance with *City of Revere, supra*, is therefore in direct conflict with it, and must not be permitted to stand.

The result of the two-judge opinion below also conflicts with the decision of this Honorable Court in the matter of *Estelle v. Gamble*, 429 U.S. 97 (1976). There, this Court equated the phrase "deliberate indifference" with unnecessary and wanton infliction of pain. Certainly, summoning of emergency medical help *before* the definite ascertainment of a medical emergency cannot under any circumstances be equated with an unnecessary and wanton infliction of pain. Consequently, there was no deliberate indifference in this matter, and yet the two-judge opinion below has effectively found to the contrary. The opinion is simply wrong.

In light of these conflicts with the decisions of this Court, whose rulings constitute the supreme law of the land, certiorari should be granted and a writ issue, so that the foregoing errors of the two-judge opinion of the Sixth Circuit may be corrected.

IV. THE RESULT BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

Pursuant to the Rules of the Supreme Court of the United States (*see*, Rule 10.1.[a]), there also exist other independent and separate grounds for the granting of certiorari in the matter now at bar. The result which emanates from the Court below conflicts with decisions rendered by other United States Courts of Appeal.

As this Court said in the case of *Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854 (1991), the principle purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts between and among the Circuit Courts of Appeal, and also state courts, with reference to the meaning of provisions of federal law. This matter is ideally suited for certiorari jurisdiction.

In *C.I.R. v. Hansen*, 360 U.S. 446 (1959), an asserted conflict between circuits in the decisions of three income tax cases involving similar facts and the same issue, was deemed to be sufficient to warrant a grant of certiorari in all three cases. Here, not only is there a conflict within the Sixth Circuit, but there is now conflict between the Sixth Circuit and other Circuits, involving similar facts and identical issues, thus warranting certiorari. *See, also, Bill v. United States*, 349 U.S. 81 (1955); and, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

The result from the two-judge opinion below retroactively accords to Respondents' decedent a constitutional

right in excess of those which actually existed, and creates a conflict with the established law. This is borne out by *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992), discussed *supra*, and by the law of the other circuits.

For instance, in the case of *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986), the Court acknowledged the right to receive medical care for persons who had been injured while in police custody. The Court expressly rejected any affirmative constitutional duty in the due process clause on the part of police officers to render CPR under any and all circumstances. *Id.*, at 1415.

The Court concluded that due process requires nothing more than that police officers seek necessary medical attention for a detainee when that detainee has been injured by either promptly summoning the necessary medical help or by taking the injured detainee to a hospital. *Id.* This was done in the matter at bar, but the result below treats your Petitioners as if it had not been done. The result thus conflicts with *Maddox*.

Similarly, the Eighth Circuit United States Court of Appeals held in *Tagstrom v. Enockson*, 857 F.2d 502 (8th Cir. 1988), that there was no affirmative constitutional duty to do anything other than summon emergency medical help for a suspect who had been injured after a high-speed motorcycle chase.

The Court expressly rejected any suggestion that the law enforcement official had been in any way deliberately indifferent to the needs of the fleeing motorcyclist. The Court observed that there was no evidentiary dispute as to the fact that the law enforcement official had called for

an ambulance immediately upon finding the crash. *See*, 857 F.2d 503-504. The result below thus conflicts with *Tagstrom*.

The fact that the result in the matter at bar was premised in part upon the improper admission of the testimony of the expert penological witness (who testified pointedly that the individual defendants had been "deliberately indifferent" to the medical needs of Respondents' decedent, which of course was a legal conclusion), represents yet another conflict with decisions of other Circuit Courts of Appeal of the United States. For example, *see*, *United States v. Baskes*, 649 F.2d 471 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981). There, the Seventh Circuit Court of Appeals held that, as to this issue, Rule 704 does not make admissible the opinions of witnesses as to the legal implications of conduct, i.e., legal conclusions.

As an example, the Court reasoned that a simple question asking whether the testator had capacity to make a will would be excluded, but that the same substantive content would be permissible, if phrased in terms of asking whether the testator had sufficient mental capacity to know the nature and extent of his property, the natural objects of his bounty, and to formulate a rational scheme of distribution thereto.

Observing that it would represent an invasion of the province of the Court to determine the law and to instruct the jury, the Court in *F.A.A. v. Landy*, 705 F.2d 624 (2nd Cir.), *cert. denied*, 104 S.Ct. 243 (1983), rejected testimony containing a legal conclusion.

The result below also fails to meet the requirement that the Court consider whether the terms used by the

witness have a separate, distinct and specialized meaning in the law which is different from that in the everyday vernacular. In *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978), the Court concluded that testimony was objectionable where an average lay person would not understand the terms at issue and ascribe to them essentially the same meaning. Here, the phrase "deliberate indifference" certainly does not fall within such a category. Instead, it has a highly distinct, separate and specialized meaning in the law. *See, Estelle v. Gamble*, 429 U.S. 97 (1976); and, *Roberts v. City of Troy*, 773 F.2d 720 (6th Cir. 1985).

Because of these conflicts between the result below and the holdings of other Circuit Courts of Appeal, this matter is appropriate for certiorari jurisdiction pursuant to the rules of this Honorable Court, and a writ should be granted.

CONCLUSION

The man was dead. Tragic but true. Each person who entered the cell and examined the suicide victim concluded that he was dead (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). The Plaintiffs have taken a garbled reference about a possible heartbeat, uttered under stress and in a probable attempt to quiet onlookers, and have spun an elaborate web of hysteria and sentimentality around it, premising their demand for compensation upon it.

Simply put, the man was dead when discovered (*Id.*). Nevertheless, great medical caution was exerted and the victim was carefully examined by numerous qualified individuals (*Id.*). They all concluded that he was dead (*Id.*). Saliently, and most importantly, Plaintiffs did not adduce one *scintilla/iota* of evidence in any way, shape, manner or form whatsoever to the contrary, that their decedent was not dead. Their adduced testimony relating to the issue was nothing more than possibilities, conjecture, and speculation. The result is therefore in conflict with other Sixth Circuit cases, is premised on inaccurate factual perceptions, is in conflict with decisions of this Supreme Court of the United States, and is in conflict with decisions of other federal circuit courts of appeal.

Accordingly, Petitioners earnestly request this Honorable Court to issue a writ of certiorari to the court below in order that this unjust result may be examined and made to conform to existing law.

Respectfully submitted,

Emil F. Sodoro, #13935
Sodoro, Daly & Sodoro
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
Tel: (402) 397-6200

Counsel of Record for Petitioners.

No. _____

In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE,
DAVID HICKS, JOE HENRY CRUTCHER,
and WANDA LUFFMAN,

Petitioners,

v.

ALLEN D. HEFLIN, and wife
JEAN LaRUE HEFLIN, and
RUE ELLEN HEFLIN, next of kin
and survivors of
HUGH ALLEN HEFLIN, Deceased,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

APPENDIX OF PETITIONER

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Allen D. HEFLIN, and his wife Jean LaRue Heflin, and Rue Ellen Heflin, next of kin and survivors of Hugh Allen Heflin, deceased, Plaintiffs-Appellees,

v.

STEWART COUNTY, TENNESSEE, David Hicks, Harry Joe Crutcher, and Wanda Luffman, Defendants-Appellants.

No. 90-6585.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 21, 1991.

Decided March 9, 1992.

Rehearing En Banc Denied June 3, 1992.

Joseph H. Johnston (briefed), Nashville, Tenn., R. Stephen Doughty (argued), Bussart, Buffaloe & Doughty, Nashville, Tenn., for plaintiffs-appellees.

George A. Dean, Parker, Lawrence, Cantrell & Deal, Nashville, Tenn. (argued and briefed), for defendants-appellants.

Before KENNEDY and BOGGS, Circuit Judges and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge.

The family of a twenty-year old pretrial detainee who committed suicide in the Stewart County, Tennessee jail sued the county, the sheriff, one deputy and the jailer under 42 U.S.C. § 1983. A jury awarded damages to the plaintiffs and the defendants appeal. The defendants seek reversal based on the district court's denial of their

motion for a directed verdict at the conclusion of the plaintiffs' case, renewed after both sides had rested. On appeal the defendants contend that the evidence was insufficient for the submission of two issues to the jury: (1) whether any act or failure to act of the defendants was the proximate cause of the inmate's death; and (2) whether any defendant acted with deliberate indifference to the inmate's medical needs after he was discovered hanging in his cell. The individual defendants also argue that they were entitled to judgment on the basis of qualified immunity. Stewart County seeks reversal as well on the ground that no county policy or custom led to the inmate's death.

I.

Hugh Allen Heflin, unmarried, a life-long resident of Stewart County, was arrested pursuant to a capias warrant on September 3, 1987. Heflin apparently had an alcohol problem, and had been arrested on earlier occasions. On June 8, 1987, Tennessee State Trooper John Smothers had arrested Heflin on a misdemeanor charge and lodged him in the Stewart County jail. While there, Heflin was involved in some sort of altercation in which he was injured. He filed a complaint with the FBI charging that Smothers and Deputy Sheriff Anderson had beaten him. The FBI had begun an investigation at the time of the September 3 arrest, but had not yet interviewed Heflin. An agent had interviewed Stewart County Sheriff Hicks, a defendant in this action, and Hicks had stated that Heflin's injuries were self-inflicted.

Jailer Luffman saw Heflin writing at a desk in his cell at approximately 11:30 a.m. on September 3. At about 11:45 a.m., inmate Richardson, who was a jail trusty, noticed that the shower in Heflin's cell was running. Some fifteen minutes later, at about noon, another inmate, Austin, informed Deputy Sheriff Crutcher that the shower in Heflin's cell had been running for a long time, "probably around fifteen minutes." Austin had called to Heflin but received no response.

Deputy Crutcher went to Heflin's cell and saw a sheet tied to the cell bars. He immediately went to the dispatcher's office for keys, returned and opened Heflin's cell. While in the office, Crutcher directed Jailer Luffman and the dispatcher to call Sheriff Hicks and the emergency ambulance service. Luffman's report showed this call at 12:06 p.m. When Crutcher entered the cell he saw Heflin "hanging by the neck on the far side of the shower stall." Heflin's hands and feet were tied together, a rag was stuffed in his mouth, and his feet were touching the floor. Inmate Austin followed the deputy into the cell; Crutcher told him to leave. With the body still hanging, Crutcher checked for a pulse and signs of respiration, but found none though the body was warm. He also opened Heflin's eyes and found his pupils were dilated. From these observations Crutcher concluded that Heflin was dead. While Crutcher was still alone in the cell with the hanging body, inmate-trusty Richardson, who had heard of the hanging upon returning from an errand, came in with a knife that he had picked up in the kitchen. Rather than using the knife, with Richardson's assistance, to cut Heflin's body down, Crutcher ordered Richardson out of the cell.

The evidence is conflicting as to whether the emergency medical team (EMT) or Sheriff Hicks arrived next. At any rate, neither the sheriff nor an EMT member supported Heflin's body or cut it down. EMT member Hollis testified that he examined the body for vital signs and found none. Hollis stated that he believed Heflin had been hanging "for at least twenty minutes" before he arrived.

Dr. Robert Lee, the County Medical Examiner and the only physician practicing in Stewart County, arrived at the jail at approximately 12:12 p.m. Dr. Lee examined the still-hanging body, then ordered the staff to cut it down and place it on a cot. Sheriff Hicks directed a deputy to take pictures of the hanging body before it was taken down. Dr. Lee examined the body in a prone position, then directed the EMT members to remove Heflin to his office for an electrocardiogram (EKG). Dr. Lee stated on the death certificate that the time of death was 12:30 p.m. and the cause of death was strangulation. There is no dispute about the cause of death.

II.

The defendants contend that there was no evidence that their action or inaction was the proximate cause of Heflin's death. They argue that Heflin was dead when Crutcher discovered him hanging, and for this reason they were entitled to a directed verdict. The plaintiffs, on the other hand, point to several items of evidence that they contend created a jury issue on proximate cause. We agree with the plaintiffs and the district court.

A.

In his report of the incident, Deputy Crutcher wrote that Dr. Lee believed he heard a heartbeat upon his initial examination of the hanging body. The report stated: "At 12:12 p.m., Dr. Robert Lee arrived at the Sheriff's Department. After checking Mr. Heflin he thought he heard a heartbeat. He advised us to cut Mr. Heflin down." At trial, when asked by the plaintiffs' lawyer if Dr. Lee actually made such a comment, Crutcher answered, "Yes, sir, that's what he said." In addition, a jail inmate named Thompson testified that he could only hear "bits and pieces" of the conversation in Heflin's cell. It was his recollection, however, that Dr. Lee said he thought Heflin "had a pulse, but he didn't." EMT member Hollis testified that Dr. Lee directed the EMT's to "get him down quick to my office where I can run an EKG on him." He also stated that Dr. Lee said, "[T]here'll probably be a hell of a lawsuit over this."

Dr. Lee testified that when he arrived at the jail he examined Heflin's chest with a stethoscope, but was unable to hear anything because there was a lot of talking and noise in the background. After quieting the onlookers Dr. Lee examined Heflin again and found no vital signs. He testified that after the body was cut down and put on the cot, he never heard a heartbeat or saw any evidence of life. According to Dr. Lee, it would be more difficult to check the vital signs of a body hanging by the neck than one "laid out flat on the floor."

B.

The plaintiffs' witness, Dr. Richard Treat, testified as a medical expert. The defendants did not challenge his

qualifications. Dr. Treat testified that even if no heartbeat or respiration was detected when Deputy Crutcher found Heflin hanging, there was up to a ten percent chance that Heflin could have been resuscitated if he had been cut down and these efforts had been "commenced immediately." The witness explained that it appeared from photographs that Heflin's airway obstruction was about eighty-five percent rather than total. A person could still survive for somewhere between twenty minutes and an hour with such an obstruction.

When asked to assume that Dr. Lee heard a heartbeat eight minutes after initial discovery of the body by Deputy Crutcher, Dr. Treat testified that in such a case, "then resuscitative efforts initiated eight minutes previously should have virtually confirmed survival, successful outcome." The chance for a young, healthy person surviving under these conditions would be "certainly above ninety-five percent." Dr. Treat testified that hanging creates a "high grade obstruction" but that strangulation by hanging "takes a long time, twenty, thirty, forty minutes to actually die by partial strangulation." The defendants concentrate on Dr. Treat's "up to ten percent" evaluation of the likelihood of resuscitation, while the plaintiffs emphasize his evaluation of "certainly above ninety-five percent."

C.

In passing on a motion for a directed verdict, the trial court views all evidence in the light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences flowing from the evidence.

McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir.1988). Having done this, without weighing the evidence or evaluating the credibility of witnesses, the court may grant a directed verdict only if it finds "that reasonable minds could not differ as to the governing facts." *Id.* Applying this standard we cannot find that the district court erred in denying the defendants Sheriff Hicks and Deputy Crutcher's motion insofar as it related to proximate cause.

No one ever attempted to resuscitate Heflin. Both Crutcher and Hicks were trained in CPR. Deputy Crutcher could have called on Jailer Luffman and trusties Austin and Richardson to assist in supporting the body and cutting it down. Instead, he sent Luffman back to the office and ordered Austin and Richardson out of the cell, even though Richardson came with a knife that could have been used to cut the bed sheets. Crutcher was not trained to determine whether a person was dead or alive. EMT member Hollis testified that he and the other team member did nothing with respect to Heflin's body because county policy in the absence of vital signs was, "[W]e don't do nothing until the proper authority says do something." It was stipulated that Sheriff Hicks is the policymaker regarding the sheriff's department and the county jail. Sheriff Hicks was present either at the time the EMT arrived, or came immediately after them. Yet, he ordered no one to attempt to revive Heflin, or even to cut him down for resuscitation efforts.

Dr. Lee was never asked if he made the comment about hearing a heartbeat as recorded by Deputy Crutcher in his incident report and verified from the witness stand. He testified that he could not hear because

of the noise in the area and that he asked the onlookers to be quiet. He stated that after the body had been cut down and laid on a cot he detected no signs of life. Nevertheless, he directed EMT Hollis to get Heflin to his office "quick" so he could administer an EKG. And, according to Hollis, Dr. Lee remarked that there would be a lawsuit over the incident. From this evidence the jury could reasonably infer that Dr. Lee believed after he arrived that there was a possibility that Heflin was still alive. The jury could further accept Dr. Treat's uncontradicted testimony that if there was a heartbeat, resuscitation efforts undertaken immediately would have carried at least a ninety-five percent chance of success, that is, of survival. Dr. Treat also testified that a person who is revived after partial strangulation for a period of twenty minutes or so would likely suffer no severe brain damage. He could be expected to "have moderate to good functional capacity following successful resuscitation."

There clearly was evidence from which the jury could find that Heflin died as a proximate result of the failure of Sheriff Hicks and Deputy Crutcher to take any steps to save his life. They left Heflin hanging for twenty minutes or more after discovering him even though the body was warm and his feet were touching the floor. Crutcher even prevented trusties Richardson and Austin from assisting. We find no such culpability with respect to Jailer Luffman, however. She only followed the orders of Crutcher and Hicks and was never in a position either to help Heflin herself or cause anyone to attempt to help him. The district court should have granted Ms. Luffman's motion for a directed verdict.

III.

The parties agree that in order to recover under the circumstances of this case the plaintiffs were required to demonstrate that the defendants' conduct amounted to "deliberate indifference to [Heflin's] serious medical needs." Pretrial detainees have a constitutional right to the same protection afforded convicted prisoners who have serious medical needs. See *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir.1985), where Judge Kennedy summarized the Supreme Court's holdings in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As with the first issue, the question for decision is whether there was sufficient evidence of deliberate indifference to take this case to the jury.

A.

Both Sheriff Hicks and Deputy Crutcher testified that in their opinion a reasonably competent officer would have believed Heflin was dead when he was first discovered. This being so, they argue, their failure to attempt to revive Heflin provides no evidence of deliberate indifference to the inmate's serious medical needs. They point out that everyone who checked Heflin for vital signs, including Dr. Lee, thought he was dead. Both denied harboring any ill will toward Heflin and testified that they treated the situation in his cell as "the scene of a crime." Thus, they did not disturb any object in the cell, including the hanging body. Both defendants denied ever having been instructed or advised that CPR should be

administered to a person found hanging even if no vital signs are detected. Even if they were wrong in assuming that Heflin was dead and that no attempt to revive him was indicated, the defendants assert that this would demonstrate nothing more than an error of judgment in a stressful situation, not deliberate indifference or conduct that shocks the conscience.

The plaintiffs respond that there is an abundance of evidence from which the jury could conclude that the defendants acted with deliberate indifference. The FBI investigation of Heflin's complaint was still open. Hicks had been questioned about that incident and Crutcher knew about the complaint. Moreover, a parole officer who came to the jail with Sheriff Hicks testified that five or six minutes after he and Hicks arrived the witness went to the cell with State Trooper Smothers, one of the persons named in Heflin's complaint. The parole officer stated that no one else was in the cell and that Heflin was still hanging. Trooper Smothers shined his light on Heflin's face, and then the two of them left. The witness could not tell whether Heflin was dead or alive. The FBI notified Trooper Smothers several weeks later that the investigation of Heflin's complaint had been closed.

B.

The evidence chiefly relied upon by the district court in refusing to direct a verdict for failure to demonstrate deliberate indifference was the testimony of Edward Totten. Without challenge to his qualifications, Totten testified as an expert in the field of correctional institutions. Under local rules, Totten read a prepared statement to the

jury before responding to questions. In that statement Totten stated, "The training provided by the Tennessee Corrections Institute and every other jailer training program that I am familiar with requires a jailer, when he discovers an inmate hanging, to find something or someone to support the person's weight, to call for assistance, and assure the immediate application of first aid and/or CPR by trained persons."

The statement added that the jailer should cut the victim down immediately with one person holding the body up and the other cutting the noose. Officers should never stand by and let the hanging victim continue to hang in order to protect the "scene of the crime." Further, even though there are no vital signs, officers should not presume that death has already occurred. " 'Dead' people are alive today due to CPR." On the contrary, officers should presume that the hanging inmate is alive and administer first aid until told by a physician to stop. Totten emphasized that Heflin's body was still warm and that his feet were touching the floor. "For the Sheriff, Deputy Crutcher and Jailer Luffman to allow him to continue to hang unsupported and withhold the life saving measures mandated by TCI Training under these circumstances is contrary to their training and common sense."

Deputy Crutcher testified that he had taken jailer training at the Tennessee Corrections Institute (TCI) in 1985, but could not remember being instructed that upon discovering a person hanging to first support the victim's weight in order to take the pressure off his neck and throat. His recollection was that he was trained to check for vital signs then "call for help and leave him hanging."

C.

Recognizing the force of Totten's testimony, the defendants seek reversal on the ground that the district court committed error by permitting Totten to state a conclusion of law. The witness's written statement concluded, "In my opinion, they were deliberately indifferent to Mr. Heflin's needs for emergency care which could have saved his life." The real problem with this statement, according to the defendants, is that it did not assist the jury in determining whether the defendants were deliberately indifferent to Heflin's medical needs. Rather, it constituted an opinion on a key legal issue in the case, and was inadmissible under Rule 702 of the Federal Rules of Evidence. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The plaintiffs respond that, in context, Totten's opinion was based on the facts and on his conclusion that the defendants had completely disregarded the prescribed practices for dealing with an inmate found hanging. He used "deliberately indifferent" in the way an ordinary layman would to describe such conduct – to state his opinion on the ultimate fact, not to state a legal conclusion. The district court's instructions, in addition to advising that an expert's opinions should be received with caution, charged the jury that in order for the defendants to be liable, their conduct must, be "deliberately

indifferent tantamount to an intent to punish" or "conduct which shocks the conscience." Totten did not express an opinion on whether the defendants' conduct was tantamount to an intent to punish or shocked the conscience.

Rule 704 of the Federal Rules of Evidence, dealing with expert testimony, provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Under Rule 702 a qualified expert may testify by "opinion or otherwise" on matters within his specialized knowledge if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 704 abolishes a long recognized "ultimate issue" objection to opinion testimony and shifts the focus of the inquiry to "whether the testimony is 'otherwise admissible.' " The decision to admit or exclude such evidence ultimately turns on whether it is helpful to the trier of fact. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985).

We do not believe the district court committed reversible error in permitting the jury to hear this particular evidence. Totten did not claim to be an expert on the legal requirements for recovery from jail officials for dereliction of duty. He testified concerning the proper procedures to be followed in the situation faced by the defendants. After setting forth in detail the manner in which the defendants failed to follow approved procedures, he stated that in his opinion this conduct demonstrated deliberate indifference to Heflin's need for "emergency care which could have saved his life." The testimony merely emphasized the witness's view of the

seriousness of the defendants' failures. Given the generality of the test, "will assist the trier of fact," we find no abuse of discretion in admitting this testimony. See *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 919 (6th Cir.1984) (no abuse of discretion to admit opinion testimony of expert where trial court's conclusion that the testimony would assist the jury was not clearly erroneous, "given the broad standards of rule 702").

D.

The defendants rely on this court's decision in *Roberts v. City of Troy*, 773 F.2d 720 (6th Cir.1985). *Roberts* involved a claim by the personal representative of a pretrial detainee who committed suicide in a jail. The plaintiff contended that the defendants failed "to promulgate and enforce procedures to identify potential suicides and prevent their occurrence." *Id.*, at 722. This court affirmed a jury verdict for the defendants. The issue is quite different in the present case. The defendants discovered the inmate in a condition that called for some action on their part. They did nothing, although the expert witness testified that proper procedure required them to cut the victim down and attempt to revive him.

We stated in *Roberts* that a plaintiff must show deliberate indifference, and not just negligence, in order to recover. We continued:

> [T]he test is whether prison administrators are taking reasonable steps to prevent a pervasive risk of harm. A pervasive risk of harm entails much more than mere negligence.

Id. at 724. When Deputy Crutcher discovered the hanging body and when Sheriff Hicks arrived at the cell, there was a "pervasive risk of harm" to Heflin. They took no reasonable steps to attempt to save his life. As we noted in *Danese v. Asman,* 875 F.2d 1239, 1244 (6th Cir.1989), "It is one thing to ignore someone who has a serious injury and is asking for help; it is another to be required to screen prisoners correctly to find out if they needed help." Heflin had a "serious injury," and his condition cried out for help.

IV.

Stewart County argues that even if the district court correctly denied the individual defendants' motion for directed verdicts, it should have granted the county's motion. A political subdivision such as Stewart County is liable under section 1983 only for injuries that result from an official policy or from governmental custom, even though such custom has not been formally approved. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690-91, 98, S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); *Molton v. City of Cleveland,* 839 F.2d 240, 243-44 (6th Cir.1988). Under appropriate circumstances, a single decision by policymakers may be sufficient to satisfy the "policy requirement" of *Monell. Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986). The district court gave a comprehensive instruction on this issue and the defendants made no objections.

The defendants assert that there was no evidence that the county had a policy or custom requiring officers on the scene of a suicide attempt at a jail to leave an inmate

found hanging while pictures were taken and until the medical examiner arrived. Furthermore, the county had sent Deputy Crutcher for training at the Tennessee Corrections Institute. If he failed to follow required procedures as instructed at the institute – or forgot his instructions – the county cannot be held liable for his derelictions.

This argument overlooks the fact that Sheriff Hicks was the sole policymaker for the conduct of jail officials. Deputy Crutcher testified that he followed jail policy in not cutting Heflin down and attempting to revive him.

Also, Sheriff Hicks's wife, who worked as a dispatcher in the jail, testified that her training was that if she discovered a suicide in progress, she was not to enter the cell alone, to always get help. "And the biggest thing I can remember is them telling us not to cut him down until help arrived." When asked if she had been instructed to support the victim's weight until there was help in cutting him down, she replied: "Not prior to '87 (the year of Heflin's death). Prior to '87, we were just instructed to not let him, the person, hit their head while taking them down." Ms. Hicks did not say who instructed her, but her testimony appeared to reflect Stewart County jail policy as stated by Deputy Crutcher.

Both Crutcher and Hicks were trained in CPR. Furthermore, after the sheriff arrived at the jail he did nothing other than follow the same policy or custom described by Crutcher. In fact, after Dr. Lee arrived and directed that Heflin be cut down, Sheriff Hicks delayed that procedure until photographs could be taken of the hanging body.

The district court properly submitted the issue of county jail policy or custom to the jury. The evidence was sufficient to support the jury's verdict awarding damages against the county.

V.

The district court denied the defendants' motion to dismiss or for summary judgment on the basis of qualified immunity. The defendants now argue that the court should have submitted their qualified immunity defense to the jury. That is clearly not the law. We stated in *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir.1988), that "[r]esolution of qualified immunity is purely a question of law." The trial judge "bears the ultimate responsibility" of resolving the questions raised by a defense of qualified immunity. *Id.* (quoting *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)).

An official relying on this defense must plead qualified immunity. If possible, the trial court then decides the issue on the basis of the pleadings, or pleadings and discovery. If there is "a factual dispute (*i.e.*, a genuine issue of material fact) involving the question on which immunity turns," summary disposition is improper and the case must go to trial. The Supreme Court has stated,

> whether an official protected by qualified immunity may be personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow [v. Fitzgerald]*, 457 U.S. [800] at 819 [102 S.Ct. 2727, 2738, 73 L.Ed.2d 396], assessed in

> light of the legal rules that were "clearly, established" at the time it was taken, *id.*, at 818 [102 S.Ct. at 2737].

Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

For a right to have been "clearly established" something more than a general constitutional right such as due process must have been recognized. Thus, the right must be established in a "more particularized . . . sense." *Id.* at 640, 107 S.Ct. at 3038. This means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.; Danese v. Asman*, 875 F.2d 1239, 1242 (6th Cir.1989). It is not necessary that the "very action in question has previously been held unlawful." Rather, the unlawfulness of the action must be apparent to the official "in the light of pre-existing law." *Id.*

There can be no doubt that in 1987 existing law clearly established the right of pretrial jail inmates to receive care for their serious medical needs. At least as early as 1985 we recognized this right as the basis for section 1983 claims involving jail suicides by hanging, referring to the Supreme Court decisions in *Estelle v. Gamble* (1976) and *Bell v. Wolfish* (1974). *Roberts*, 773 F.2d at 723. The unlawfulness of doing nothing to attempt to save Heflin's life would have been apparent to a reasonable official in Crutcher and Hicks's position "in the light of pre-existing law."

VI.

In her dissenting opinion, Judge Kennedy finds a conflict between this majority opinion and that of a

different panel of this court in *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir.1992). The facts were significantly different in *Rich.* We agree with the *Rich* conclusion that there were no facts that would support a judgment of deliberate indifference in that case. The first person to discover the hanging victim went immediately to call for help. There was no period when responsible officers were doing nothing but waiting for someone else to make the first move, as in the present case. And, of course, *Rich* did not present the scenario of the ranking county official present directing that the victim not be cut down until photographs could be taken.

The dissenting opinion questions the legal standard that we apply in concluding that individual defendants are not entitled to qualified immunity. According to the dissent, only a generalized right to medical care was established, not a particularized right of a hanging victim to be cut down immediately and administered CPR. There is no requirement of absolute factual identity before the law may be found to be "clearly established." *Bennis v. Gable,* 823 F.2d 723, 733 (3d Cir.1987). The particularized requirement that custodians not act with deliberate indifference to the serious medical needs of pretrial detainees was clearly established. It was stipulated that the individual defendants Hicks and Crutcher had completed the TCI course at which they were instructed that hanging victims must be cut down immediately and given first aid, including CPR. It is reasonable to hold them to a standard that does not permit a victim to remain hanging for eight minutes or more.

The dissenting opinion also expresses concern over the "internal inconsistency" of a verdict finding both

individual and municipal liability. The complaint clearly shows that Hicks and Crutcher were sued in their official capacities. Furthermore, it was stipulated that Hicks was responsible for formulating policy for the jail and evidence showed that Crutcher followed that policy rather than taking the steps prescribed by the Tennessee Correctional Institute. Under these circumstances we fail to find an inconsistency in holding both the county and these two defendants liable.

The judgment against Ms. Luffman is reversed. The judgment awarding damages against Sheriff Hicks, Deputy Crutcher and Stewart County is affirmed. The plaintiffs will recover their costs on appeal from Hicks, Crutcher and Stewart County. Ms. Luffman will recover her costs on appeal from the plaintiffs.

KENNEDY, Circuit Judge, dissenting.

I am unable to agree with the majority's conclusion that the plaintiff established a sufficient casual nexus between the failure to act on the part of the individual defendants and the death of the decedent, and therefore respectfully dissent. Further, I do not find a sufficiently particularized constitutional right of a suicide victim to be cut down immediately upon discovery to have been clearly established, and so would accord the individual defendants qualified immunity. I am also troubled by a verdict which essentially finds that the individual defendants, especially Crutcher, acted with a personalized intent to punish the decedent, yet also essentially finds that the individual defendants were executing a county custom or policy. Finally, I would remand the case for a

new trial in light of what I consider to be the admission of improper testimony by plaintiffs' expert witness.

Fundamental to plaintiffs' recovery is the finding that the decedent could have been revived upon discovery by Deputy Crutcher. I do not believe sufficient evidence was presented to support such a finding. Plaintiffs' expert testified that if no heartbeat was heard by any of the parties checking for vital signs, then the decedent had, at most, up to a ten percent chance of survival. The only evidence offered to support a finding of a heartbeat was hearsay testimony that the county medical examiner, in seeking to quiet the scene during his initial check for vital signs, said that he thought he heard a heartbeat. The doctor himself testified that he never heard a heartbeat. His previous statement and his court testimony are not inconsistent. Several minutes before the doctor's arrival, two EMT's using stethoscopes could not detect a heartbeat. Of four checks for vital signs by trained medical personnel, therefore, the only evidence of a heartbeat came from an alleged statement referring to the possibility of a heartbeat made in quieting a scene that made it difficult, if not impossible, to hear anything. Viewing the evidence in the light most favorable to the non-moving party, *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir.1988), I find an absence of anything more substantial than a scintilla of hope that there was in fact a heartbeat and therefore a chance of being resuscitated.

I am also troubled by the internal inconsistency of a verdict finding both individual liability and municipal liability. The majority upholds the verdict against Stewart County, finding a policy established by the county Sheriff

in his official capacity, of not cutting down and resuscitating hanging victims. Acting under this policy, individual actors who fail to cut down hanging victims cannot be said to possess any form of intent to punish a particular detainee, but rather are simply following county policy. Or vice versa, if the individual actors are found to have acted with a deliberate indifference to the medical needs of the decedent tantamount to an intent to punish, they could not have been following the county policy. I do not see how the deliberate indifference tantamount to an intent to punish and the county policy can both have been the motivation behind the failure to administer CPR and therefore a cause of the death. If we are to uphold the county's liability, the verdict against Crutcher must be set aside.

Since the sheriff was both a policy maker and an employee/actor, it may be possible that liability can attach for either one of these roles. However, determining policy is a legislative function for which immunity is traditionally granted. When he carries out that policy as an employee, he should have the same qualified immunity afforded to any other employee. Whichever hat he is determined to be wearing for liability purposes, there cannot be both municipal liability for the policy and individual liability for deliberate indifference.

I also disagree with both the legal standard and its application by the majority with respect to the question of qualified immunity for the individual defendants. While it is true that a detainee's generalized right to medical care was clearly established in 1987, *see Scharfenberger v. Wingo*, 542 F.2d 328 (6th Cir.1976), I do not agree that,

properly particularized, the right of hanging victims displaying no vital signs to be immediately cut down and administered CPR by jail officials was clearly established such that a reasonable official would have known of it. *See Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir.1992). Further, I disagree with the majority's characterization of the facts at issue here. Crutcher was not indifferent to Heflin's condition. It is undisputed that he immediately called for medical assistance, checked for vital signs, and finding the pupils dilated and the heart stopped, ensured that no one disturbed the body. It must be kept in mind that unless defendants were consciously aware of the possibility that Heflin was still alive, they could not be guilty of deliberate indifference.[1] Although Crutcher's actions may not have been as efficacious as attempting CPR, they do not constitute nothing, and they certainly meet the standard of medical care that was clearly established as the right of detainees in 1987. *Id.* at 1097.

Finally, I would remand the case in light of what I consider to have been an abuse of discretion on the part of the District Court in allowing the expert penological witness to testify that it was his expert opinion that the defendants were deliberately indifferent to the medical needs of the decedent. Rule 704 of the Federal Rules of Evidence does not operate to open the door to all testimony on ultimate legal issues, but rather shifts the focus to whether the testimony is "otherwise admissible."

---

[1] I do not believe that the panel is suggesting that defendants were deliberately indifferent in not acquiring knowledge about possibilities of resuscitating victims.

Torres v. County of Oakland, 758 F.2d 147, 150 (6th Cir.1985). I do not think the testimony here is otherwise admissible for two reasons.

First as noted by the trial judge, the testimony here "smack[s] of just flat out telling how the jury ought to decide the case." As noted in *Torres*, proper analysis examines whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. *Id.* at 151. Just as a witness cannot testify that a party was negligent in failing to do something, I believe an expert should not be allowed to state that the party was deliberately indifferent in failing to do something.

Second, and more importantly, the witness possessed no specialized knowledge as to the mental state of the individual defendants so as to be able to assist the trier of fact. The witness was a corrections expert. He was therefore qualified to testify to what the defendants' training may have been, or what it should have been. He was in a position to assist the trier of fact as to the standards of care in the corrections field, and as to what a reasonable jailer might have been expected to do.

The expert has no specialized knowledge that would assist the trier of fact, however, relating to the mental state and motivation of the defendants. Yet his testimony that they were deliberately indifferent can only encompass his opinion as to their state of mind, i.e. was it accident, happenstance, or negligent error that caused them to fail to cut the victim down, or did they affirmatively and consciously choose to not cut him down? Were they ignorant of his chance of survival, either through

inadequate training or negligent response to the circumstances, or did they consciously ignore his known chance of survival? The testimony did more than simply emphasize the witness' view of the seriousness of the defendants' failures to follow proper correctional procedure, as the majority contends, it spoke to defendants' states of mind and mental culpability. Because of the expert's impressive credentials, the jury would be very likely to accept his opinion rather than reach their own.

This error cannot be deemed harmless, moreover, in light of the paucity of evidence relating to intent. The only evidence offered indicating any motive or intent to punish the decedent was circumstantial evidence relating to a civil rights complaint filed by the decedent against a Tennessee State Trooper, who was in no way affiliated with the individual defendants or involved in their failure to cut the victim down. It was highly prejudicial, therefore, when the only expert corrections witness at trial testified that in his opinion the defendants had acted with deliberate indifference.

For the foregoing reasons, I respectfully DISSENT.

No. 90-6585

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALLEN D. HEFLIN, and wife JEAN LaRUE HEFLIN, and RUE ELLEN HEFLIN, next of kin and survivors of HUGH ALLEN HEFLIN, deceased

Plaintiffs-Appellees,

v.

STEWART COUNTY, TENNESSEE, DAVID HICKS, JOE HENRY CRUTCHER, and WANDA LUFFMAN,

Defendants-Appellants.

ORDER

(Filed July 1, 1992)

Before: KENNEDY and BOGGS, Circuit Judges; and LIVELY, Senior Circuit Judge.

The appellants filed a petition for rehearing with the suggestion for rehearing en banc. The required number of judges did not vote in favor of rehearing en banc and accordingly the petition was referred to the original hearing panel. This panel denied the petition for rehearing in an order filed June 3, 1992.

Upon reconsideration, the panel grants the petition for rehearing to the limited extent of noting that the individual defendants David Hicks, Harry Joe Crutcher and Wanda Luffman were sued only in their official capacities. The judgment entered by the district court

awarded damages against the defendant Stewart County and the individual defendants jointly and severally. This court reversed the judgment against the defendant Wanda Luffman and affirmed the judgment against Stewart County, David Hicks and Harry Joe Crutcher. Because David Hicks and Harry Joe Crutcher were sued only in their official capacities, any judgment against them becomes a judgment against the county. Thus, only the defendant Stewart County may be held liable for the payment of the jury award.

Judge Kennedy would grant rehearing for the reasons stated in her dissent.

Entered by order of the court.

/s/ Leland Green
Clerk

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Rules of the Supreme Court

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

Federal Rules of Evidence

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Federal Rules of Evidence

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(As amended Pub.L. 98-473, Title II, § 406, Oct. 12, 1984, 98 Stat. 2067.)

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

(2)

No. 92-387

FILED
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In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ALLEN D. HEFLIN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Joseph H. Johnston
(Counsel of Record)
P. O. Box 120874
Acklen Station
Nashville, TN 37212
(615) 383-2119

R. Stephen Doughty
20th Floor
Third National Financial Center
Nashville, TN 37219

Robert Belton
Vanderbilt Law School
Nashville, TN 37240

Counsel for Respondents

CASILLAS PRESS, INC., 1000 CONNECTICUT AVENUE, N.W., WASHINGTON, D.C. 20036

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QUESTIONS PRESENTED

Petitioners list six questions in their Petition, but Respondents submit that only two questions are properly raised:

1. Whether the Sixth Circuit misapplied established precedents in affirming the jury's factual determination that Petitioner Stewart County had acted with deliberate indifference to the serious medical needs of Respondents' decedent, a pretrial detainee attempting suicide, after finding him hanging by his neck in his jail cell?

2. Whether the Sixth Circuit erred in holding that the trial court did not abuse its discretion in applying the "will assist the trier of fact" test of Rule 702, Federal Rules of Evidence, in permitting the jury to hear a penologist's expert opinion that Stewart County's actions were "deliberately indifferent to [the pretrial detainee's] need for emergency care which could have saved his life"?

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---

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

Petitioners' statement of the case does not adequately describe the relevant facts and the reasoning of the Sixth Circuit.

Hugh Allen Heflin, a twenty-two-year-old pretrial detainee, committed suicide in the Stewart County, Tennessee jail. Respondents, the family of Heflin, sued Stewart County and employees of the jail in an action under 42 U. S. C. Sec. 1983. Respondents sought relief on the theory that Petitioners' conduct amounted to constitutionally deliberate indifference to the serious medical needs of Heflin. The case was submitted to a jury under an instruction that deliberate indifference must

be tantamount to an intent to punish or conduct that shocks the conscience. Pet. App. A12-A13. One of the factual issues the jury had to decide, based on conflicting testimony, was whether Heflin was still alive at the time he was found hanging by his neck in his cell. The jury resolved the factual dispute in favor of Respondents and awarded modest damages of $150,000. Petitioners appealed to the Court of Appeals for the Sixth Circuit. In its original opinion, the Sixth Circuit, in a 2-1 decision, affirmed both the trial court's denial of Petitioners' motion for a directed verdict and the jury's decision. Subsequently, the Sixth Circuit denied Petitioners' request for rehearing with a suggestion for rehearing en banc, except to dismiss the case against the individual employees of the jail. Pet. App. A26-A27. Thus, although the only remaining Petitioner is Stewart County, Respondents use the term "Petitioners," as their Petition does.

Petitioners raised a number of issues on appeal. Only two of the issues addressed by the Sixth Circuit are relevant to the questions presented in their Petition for certiorari. The facts relevant to those two issues are set out below.

First: Respondents argued in the Sixth Circuit that the evidence did not support the jury's finding of deliberate indifference. The Sixth Circuit disagreed, ruling that, based on conflicting evidence, reasonable minds could differ on whether the evidence supported a factual finding that Heflin was still alive at the time he was found hanging by his neck in his cell and on whether Petitioners acted with deliberate indifference to this serious medical condition. *See* Pet. App. A6-A7. Petitioners had allowed Heflin to remain hanging by his neck for at least eight minutes or more after they had discovered him, even though his body was warm and his feet were touching the floor. Pet. App. A6. None of the jail employees attempted to provide Heflin with emergency medical care. Pet. App. A7.

The evidence on whether Heflin was still alive when he was first discovered hanging by his neck included a statement made by Dr. Robert Lee, the County's Medical Examiner. Dr. Lee said that "[T]here'll probably be a hell of a lawsuit over this" after immediately directing emergency medical technicians to cut Heflin down and take him to Dr. Lee's office for an EKG. Pet. App. A5. The evidence also included testimony by Respondents' medical expert, Dr. Treat. Dr. Treat testified, without objection, that if Heflin had had a heartbeat when Dr. Lee finally examined Heflin in his cell, as some of Petitioners' witnesses testified, there was a ninety-five percent chance that Heflin could have survived if he had been cut down immediately and efforts to provide emergency medical treatment had been initiated. Dr. Treat also testified that, since Heflin's airway obstruction was only about eighty-five percent rather than total, Heflin could still have survived from somewhere between twenty minutes to an hour even with such an obstruction. Pet. App. A5-A6. Based on the conflicting evidence, the Sixth Circuit found that the jury could reasonably draw a factual inference that Heflin was still alive when Dr. Lee arrived, even though he had been hanging for twenty minutes or more. Pet. App. A4, A8.

The Sixth Circuit also noted that the record contained an "abundance of evidence" (Pet. App. A10) to support the jury's factual finding of deliberate indifference based, in part, on Respondents' theory that Petitioners' complete failure to provide Heflin with any medical assistance before the arrival of Dr. Lee was in retaliation for Heflin's filing of a complaint with the FBI. Heflin's FBI complaint grew out of a prior incarceration in the Stewart County jail and alleged that a jailer of Stewart County and a Tennessee state trooper had beaten him in violation of his civil rights. The FBI had begun an investigation of Heflin's complaint but had not concluded it at the time of Heflin's suicide. Pet. App. A2, A10.

When emergency medical technicians finally arrived at the jail, Heflin had been hanging about twenty minutes or more. Pet. App. A4. Although the emergency medical technicians were trained to give CPR, they made no effort to cut Heflin down or to otherwise provide medical assistance to him because the sheriff, who was stipulated to be the policymaker for the jail, had adopted a policy mandating that, in the absence of vital signs in a suicide case, "nothing [is to be done] until proper authority says do something." Pet. App. A7. The sheriff's policy was contrary to the training procedures taught by the Tennessee Corrections Institute that jailers are to follow in jail suicide cases. As a result of Heflin's FBI complaint, the sheriff had been interviewed by the FBI just a few months before Heflin's suicide. Pet. App. A2. In addition, a fellow prisoner, a trusty, came to Heflin's cell shortly after he was found hanging. The trusty, aware of Heflin's situation, had picked up a knife from the jail's kitchen and had taken it with him to Heflin's cell with the expectation that it would be used to cut Heflin down. Rather than use the knife to cut Heflin down, a jailer ordered the trusty out of the cell area, and, following the sheriff's policy, did not use the knife to cut Heflin down. Pet. App. A3.

Second: Petitioners alleged that the trial court committed reversible error in rejecting Petitioners' objection to the testimony of Repondents' penology expert, Mr. Ed Totten, who had used the phrase "deliberately indifferent" in his opinion testimony. Petitioners' objection was that this phrase was contrary to the philosophy of the Federal Rules of Evidence on expert testimony because it was tantamount to a conclusion of law. The context in which the expert made the statement shows that it was properly admitted:

> Jailers must presume that an inmate is alive and administer first aid until told by a physician to stop.

> Mr. Heflin was still warm when he was discovered. His feet were touching the floor. He was obviously in a life or death situation. For the Sheriff, Deputy Crutcher and Jailer Luffman to allow him to continue to hang unsupported and without lifesaving measures mandated by [Tennessee Corrections Institute standards that jailers should follow upon discovery of inmates attempting suicide] under these circumstances, is contrary to their training and common sense. In my opinion, they were deliberately indifferent to Mr. Heflin's need for emergency care which could have saved his life. Vol. III, Trial Transcript, at 94, 95.

The trial court rejected Petitioners' objection in denying their motion for a directed verdict, as did the Sixth Circuit. First, relying on Rule 704, Federal Rules of Evidence, the Sixth Circuit held that the expert's testimony was not inadmissible because it embraced an ultimate issue to be decided by the trier of fact. Second, based on the "will the evidence assist the trier of fact" test of Rule 702, the Sixth Circuit held that the trial court had not abused its discretion in allowing the jury to consider the expert's testimony which included the "deliberately indifferent" phrase. Pet. App. A12-A14. Third, the district court's instructions to the jury not only advised the jury to receive Mr. Totten's expert opinion with caution, but also correctly instructed the jury that the standard of deliberate indifference requires a finding that the Petitioners' conduct was tantamount to an intent to punish, or conduct which shocks the conscience. Pet. App. at A12-A13.

One of the issues Petitioners raise in their Petition is whether the Sixth Circuit properly applied the rule of *Anderson v. Creighton*, 483 U. S. 635 (1987). Question No. 4, Petition, at i. In *Anderson v. Creighton*, this Court held that state

actors sued in their individual capacity are entitled to qualified immunity from damages when sued in a Section 1983 constitutional tort claim unless the constitutional right at stake was "clearly established" at the time of the alleged deprivation. The issue whether the Sixth Circuit correctly applied the qualified immunity rule under *Anderson v. Creighton*, which was a major focus of Judge Kennedy's dissent (Pet. App. A21-A23), is moot because, on Petitioners' petition for rehearing with a suggestion for rehearing en banc, the Sixth Circuit held that only Stewart County was liable for damages. Pet. App. A26-A27.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

Petitioners have taken a scattergun approach in attempting to articulate issues and reasons why this case has national importance worthy of the attention of this Court. For example, Petitioners have raised the issue of qualified immunity under *Anderson v. Creighton*, 483 U. S. 635 (1987), although that issue is now moot in light of the Sixth Circuit's decision on rehearing, dismissing the individual employees. Pet. App. A27. At bottom, they ask this Court to exercise its supervisory certiorari jurisdiction because they believe that the Sixth Circuit has departed from the usual and accepted course of judicial proceedings, or as they put it, the "opinion is simply wrong." Pet. at 19. Petitioners also argue that the Court should exercise its supervisory certiorari jurisdiction to resolve a purely intracircuit conflict, and they disagree with the result of the Sixth Circuit's review of the factual record on which the jury based its decision. Neither argument is sufficient, as a matter of law or fact, to satisfy the standards for certiorari review by this Court.

II. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT DID NOT DEPART FROM ESTABLISHED PRECEDENTS IN UPHOLDING THE JURY'S FACTUAL FINDING OF DELIBERATE INDIFFERENCE

In *Estelle v. Gamble*, 429 U. S. 97 (1976), this Court held that the standard of deliberate indifference to serious medical needs applies to claims by prisoners seeking redress for denial of medical attention while in prison. In *Roberts v. City of Troy*, 773 F. 2d 720 (6th Cir. 1985), the Sixth Circuit held that the *Estelle v. Gamble* standard applies in jail suicide cases involving pretrial detainees. In reaching that result, *Roberts* applied the reasoning in *Bell v. Wolfish*, 441 U. S. 520 (1979), in which this Court held that pretrial detainees who have not been convicted of any crime retain at least those constitutional rights that are enjoyed by convicted prisoners. *Roberts*, 773 F. 2d at 723. *See also Simmons v. City of Philadelphia*, 947 F. 2d 1042 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1671 (1992). Petitioners cite no cases, because there are none, in which the circuit courts have held that a standard other than the deliberate indifference standard applies to pretrial detainee jail suicide cases.

Petitioners argue that the decision below conflicts with this Court's decision in *City of Revere v. Massachusetts General Hospital*, 463 U. S. 239 (1983). Pet. at 19. But *City of Revere* has no applicability to the issues raised by Petitioners. The issue in City of Revere was whether a municipality's constitutional duty to provide medical care to a person injured by police officers in the performance of their duty includes a corresponding duty to compensate the provider of that medical care. 463 U. S. at 240.

The Sixth Circuit recognized that the evidence was in conflict as to whether Petitioners' conduct amounted to deliberate indifference to the serious medical needs of Heflin upon discovering him hanging by his neck in his cell. Pet. App. A9-A10. This factual dispute was submitted to the jury to resolve, and Petitioners do not challenge the sufficiency of the jury instructions on deliberate indifference. Fundamentally, Petitioners are asking this Court to exercise its supervisory certiorari jurisdiction to accept their version of the facts and inferences to be drawn from the evidentiary record and to overturn those of the jury and the Sixth Circuit.

Petitioners' arguments, when stripped of all their rhetoric, boil down to a disagreement with the factual record on which the jury made its decision and a personal attack on the Sixth Circuit as to how that court reviewed the evidentiary factual conflicts that had to be resolved by the jury. Thus, for example, Petitioners argue that the decision of the Sixth Circuit is based on "factual misperceptions and distortions," Pet. at 18; the Sixth Circuit "inaccurately perceive[d] the facts of the case," Pet. at 16; the decision below is based on "blatant misstatements" of the facts by the Sixth Circuit, Pet. at 17; the decision below is based on factual "insinuat[ions]" not supported by the record, Pet. at 17; and the Sixth Circuit engaged in "glib transmogrification of the fact[s]." Pet. at 18. This type of factual disagreement is not a proper basis for certiorari.

III. INTRACIRCUIT CONFLICTS ARE NOT A BASIS FOR EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION

Petitioners' argument that this Court should exercise its supervisory certiorari jurisdiction because of an intracircuit conflict is also based on their disagreement with how the Sixth

Circuit reviewed the evidentiary record in this case and its "rank refusal" to reach the same results the court had reached in an earlier case, *Rich v. City of Mayfield Heights*, 955 F. 2d 1092 (6th Cir. 1992). Pet. at 5. *Rich*, like the instant case, involved the suicide of a jail inmate. The panel majority, however, found the evidence in *Rich* and the instant case to be significantly different. Pet. App. A18-A19. Apparently the members of the Sixth Circuit did not believe that the the two cases were in conflict because the court denied rehearing en banc. Pet. App. A26. Moreover, it has long been recognized that an intracircuit conflict is not a basis for granting a writ of certiorari. Intracircuit conflicts, to the extent they exist, ordinarily are left to resolution by en banc sittings of the courts of appeals. *See Davis v. United States*, 417 U. S. 333, 340 (1974). *See also Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991) (principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts between the circuits).

IV. THE ADMISSION OF THE TESTIMONY OF RESPONDENTS' PENOLOGIST EXPERT IS CONSISTENT WITH THE PHILOSOPHY OF RULE 704 OF THE FEDERAL RULES OF EVIDENCE

Petitioners also ask the Court to decide "[w]hether or not a non-qualified expert may give testimony containing legal conclusions." Pet. at i. The expert whose testimony is at issue is the Respondents' penologist expert, Edward Totten. The trial court found Mr. Totten to be qualified as a penology expert. Vol. III, Trial Transcript, at 83-84. Mr. Totten stated that, "In my opinion they were deliberately indifferent to Mr. Heflin's need for emergency care which could have saved his life." Pet. App. A12. Petitioners' argument is that the admission into evidence of Mr. Totten's testimony warrants the

exercise of this Court's supervisory certiorari jurisdiction to correct what they deem to be an uncorrected abuse of discretion by a district court under the Federal Rules of Evidence. Pet. at 14-15. But the reasons relied upon by the Sixth Circuit in upholding the discretion of the trial court in admitting the testimony simply do not raise an issue that warrants this Court's review, particularly so in the form raised by the Petitioners. Nor does the ruling create "blatant and irreconcilable conflicts" among the circuits. Pet. at 15. Once again, Petitioners point to no conflict with a decision of this Court or any other court of appeals, but simply believe the ruling of the Sixth Circuit was in error; but even this view is mistaken.

The ruling of the Sixth Circuit in upholding the exercise of discretion of the trial court to admit the testimony of Mr. Totten is consistent with the philosophy of the Federal Rules of Evidence on expert testimony. The test on the admissibility of testimony by a qualified expert under Rule 702 of the Federal Rules of Evidence is whether it "will assist the trier of fact to understand the evidence or to determine a fact in issue." And Rule 704 of the Federal Rules of Evidence abolished the long recognized "ultimate issue" objection. Fed. R. Evid., Rule 704, Note of Advisory Committee on 1972 Proposed Rules.

The Sixth Circuit gave clear and legally sufficient reasons in holding that the trial court's exercise of discretion satisfied the "assist the trier of fact" test of Rule 702. First, the court concluded that Mr. Totten's opinion was based on facts. His conclusion, based on those facts, was that Petitioners had completely disregarded well-established policies under Tennessee rules for jailers in dealing with inmates found hanging in their cells. Pet. App. A12. Second, the Sixth Circuit reasoned that Mr. Totten had used the phrase "deliberately indifferent" to state a fact as ordinary laymen do, and not to state a legal

conclusion. Pet. App. A12. Third, the Sixth Circuit reasoned that Mr. Totten's use of this phrase "merely emphasized [his] view of the seriousness of [Petitioners'] failures." Pet. App. A13-A14. Fourth, the Sixth Circuit found, as is clearly supported by the record, that the trial court had taken necessary steps in its instructions to the jury to preserve the jury's role as factfinder. The trial court had instructed the jury that Mr. Totten's opinion should be received with caution. Fifth, and most importantly, the trial court made clear in its instructions to the jury that the correct standard on deliberate indifference requires a finding that the conduct of Petitioners must be "tantamount to an intent to punish" or "conduct which shocks the conscience." Pet. App. A12-A13. The trial court's cautionary instruction and its clear statement of the appropriate standard were consistent with the philosophy of Rules 702 and 704. Petitioners have advanced no argument that the grounds on which the Sixth Circuit found that the trial court had not abused its discretion in admitting the testimony of Mr. Totten are in conflict with any legal standard.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Joseph H. Johnston
(Counsel of Record)
P. O. Box 120874
Acklen Station
Nashville, TN 37212

R. Stephen Doughty
20th Floor
Third National Financial Center
Nashville, TN 37219

Robert Belton
Vanderbilt Law School
Nashville, TN 37240

Counsel for Respondents

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No. 92-387

In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE, DAVID HICKS, JOE HENRY CRUTCHER, and WANDA LUFFMAN,

Petitioners,

v.

ALLEN D. HEFLIN, and wife JEAN LaRUE HEFLIN, and RUE ELLEN HEFLIN, next of kin and survivors of HUGH ALLEN HEFLIN, Deceased,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EMIL F. SODORO, #13935
SODORO, DALY & SODORO
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
Tel: (402) 397-6200

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THERE WAS ABSOLUTELY NO BASIS FOR THE IMPOSITION OF LIABILITY IN THE MATTER NOW BEFORE THIS COURT.

There was absolutely no basis whatever for the liability which has been imposed in the case now before this Court. Petitioners have simply pointed up the ways and manner in which the result from all of the proceedings below fails to accord with existing law, and of the ways in which these errors are reflected in the opinion below. Again, we are not looking at a factual dispute. Indeed, relatively few of the basic, operative facts in the record were at dispute in any significant degree. What we have here is a result which is contrary to existing law and contrary to accepted judicial custom and practice. The Petitioners are entitled to, and should, pursue their recourse, just as Respondents have freely pursued what they believed to be their recourse from the outset.

This case largely distills to two focal points: whether or not there was deliberate indifference; and, whether or not the body of the deceased should have been cut down immediately upon discovery. Unless one or both of these elements are in fact present, there is no possibility of liability.

As set forth in this Brief, and in our Petition for Writ of Certiorari (hereinafter "Petition"), neither are present. The no deliberate indifference requirement was met because prompt emergency medical care was rendered, *even to the point of sending for it before the actual discovery of the body took place*. As to the second focal point, there was no constitutional right of a pre-trial detainee suicide to be cut down immediately upon discovery. In order for liability to obtain, such a right would have to have been pre-existing, and clearly established in the law.

Skirting these simple realities, Respondents *inter alia* effectively argue that it is now "too late" for this Court to redress this matter. Far from it. The Respondents have simply

not met the proper legal standard for the imposition of liability in this case. Accordingly, it is within the well-established province of this Court to redress the matter. In the somewhat structurally similar case of *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), the United States Supreme Court reversed and remanded a decision, finding in relevant part that the respondent had failed to establish the existence of an unconstitutional governmental policy, which would have been necessary in order to impose liability against the governmental entity. The Court rejected the respondent's contention that the issue had not been preserved for review, finding that although the petitioner itself had proffered the relevant jury instruction, that the failure to object to a jury instruction does not render the instruction to be the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict motion. *Id.*, at 108 S.Ct. 922.

This Honorable Court reasoned that the petitioner's legal position in the District Court, as well as in its petition for writ of certiorari had been consistent; namely, that the respondent had failed to establish the existence of an unconstitutional governmental policy. So also here, where the Petitioners' position has been consistent throughout: that there was no deliberate indifference, and that there was no constitutional violation by virtue of the fact that the deceased was not cut down immediately upon discovery.

This Court went on to observe in *City of St. Louis, supra,* at 108 S.Ct. 922, that it "should not be surprising" if the petitioner's arguments in the district court were much less detailed than the arguments it now made in response to the decision of the court of appeals. That, reasoned this Court, does not imply that the petitioner had failed to preserve the issue raised. *Id.*

Also observing that the petitioner had throughout the litigation been confronted with a "legal landscape" whose contours are in a "state of evolving definition" (*Id.* at 922), this Court proceeded to decide the merits. We respectfully submit that we, too, have been confronted with a similar legal

landscape. Just as this Court in *City of St. Louis, supra,* proceeded to address a matter which "manifestly need[ed] clarification" (*Id.* at 922), so also we respectfully submit that this Court should address the matters presented by this case, which can be said to be susceptible to clarification.

The United States Supreme Court, in the case of *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), held that a single act of misconduct by a street officer was an insufficient basis upon which to impose liability against the governmental entity. *Id.*, at 471 U.S. 823-24, 105 S.Ct. at 2436. What we really have in this case, if anything, is a single incident. Let us assume *arguendo* and just for a moment that the activity was unconstitutional. There was absolutely no proof that it was caused by an existing, unconstitutional governmental policy, which could be attributed to any governmental policy maker. There can be no question that the prompt medical requirement of the deliberate indifference standard was met, since medical care was summoned even before the discovery of the deceased's body. The only remaining point is that of the right to be cut down, if any. Since there is no constitutional right to be cut down immediately upon discovery under these circumstances, there was no unconstitutional governmental policy. Therefore, there could be no proof that the failure to cut down [not even unconstitutional in and of itself], was caused by an existing unconstitutional governmental policy. *See*, also, *Martin v. Swift et al.*, 781 F.Supp. 1250 (E.D.Mich. 1992). As the Court in Tuttle observed, " . . . some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional. . . . Obviously, if one retreats far enough from a constitutional violation, some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official: for example, Rotramel [the officer] would never have killed Tuttle [the decedent] if Oklahoma City did not have a 'policy' of establishing a police force." *Id.*, at 105 S.Ct. 2436.

Indeed, it is all too often forgotten that 42 U.S.C. § 1983 does not in and of itself establish liabilities, but rather it only

provides remedies for violations of previously-extant constitutional rights. Since there were no violations in the matter now before this Court, there can be no entitlement to remedies. *Tuttle, supra,* at 105 S.Ct. 2432.

Some other points made by Respondents must be addressed: Respondents incorrectly state that the Sixth Circuit opinion "noted" that the record contained an "abundance of evidence" supporting the jury's alleged factual finding. (Res. Brief in Opp., page 3.) However, what the opinion says (petitioner Appendix A10) was that it was *Plaintiffs' position* that there was an abundance of evidence in that regard.

Contrary to Respondents' contention of mootness on the issue of whether there was a pre-existing, clearly-established right extant, of a pretrial detainee, would-be suicide, to be immediately cut down upon discovery (which they characterize as the application of the qualified immunity rule), that aspect of the case is not moot at all. Indeed, as discussed *supra*, there was no right extant at the time, there was no violation, and there is no liability upon the part of anyone, Stewart County or otherwise. That aspect of the case remains very vital.

Respondents complain (Res. Brief in Opp., page 7) that Petitioners have not cited cases in which circuit courts have held that a standard "other than the deliberate indifference standard applies to pretrial detainee jail suicide cases." However, that is not the issue. There was *no* clearly-established right of a would-be jail suicide pretrial detainee to be cut down immediately upon discovery. *See, Cross v. City of Des Moines et al.,* 965 F.2d 629 (8th Cir. 1992); *Pesek v. City of Brunswick et al.,* 794 F.Supp. 768 (N.D.Ohio 1992); *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992). Therefore, it necessarily follows that failure to cut down a would-be suicide pretrial detainee immediately upon discovery is not deliberate indifference. There either is or is not such a right. There is not. *Id.* "Deliberate indifference" operates within the parameters of constitutional minimums; it does not operate in the theoretical ivory-tower abstract. *See,* for example, *Kohatsu v. U.S.,* 351 F.2d 898 (Ct.App.Cal. 1965); and, by analogy, *City of Los Angeles v. Lyons,* 461 U.S. 95,

103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Therefore, there was no deliberate indifference.

Respondents completely misunderstand *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). Respondents would relegate this case to answering the question of who pays the bill. However, the determination made therein of that question necessarily rested first upon a finding that the governmental entity's constitutional due process obligation had been fulfilled because the police there had taken the injured party to a hospital promptly in order that he might be provided necessary medical treatment. If the conduct there was sufficient to fulfill due process constitutional considerations, then the same conduct here of prompt medical attention is also sufficient (again, recall that this decedent was already dead – medical attention, prompt or otherwise, changed nothing).

Respondents baldly assert that our request for this Court to exercise its supervisory power of jurisprudence is based merely on our "disagreement" with what it characterizes as the Sixth Circuit's evidentiary review. They fail to explain why such is the case, however.

They then also conclude that the Sixth Circuit did not see any conflict between this case and the earlier case of *Rich, supra*. However, is it axiomatic that a denial of appellate review has no precedential authority or weight. *See, Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (. . . a denial of certiorari imports no expression of opinion on the merits of the case, and, concomitantly, opinions accompanying such denial cannot have the same effect as decisions on the merits); *United States v. Carver*, 260 U.S. 482, 483 S.Ct. 181, 67 L.Ed. 361 (1923); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); and, *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

Neither does the denial of a rehearing *en banc* import any precedential significance. *See, Harris v. Luckey*, 918 F.2d 888 (11th Cir. 1990) (denial of a request for a rehearing *en banc* does not have precedential weight); *Luckey v. Miller*, 929 F.2d

618 (11th Cir. 1991) (the summary denial of a petition for rehearing *en banc* was insufficient to confer any implication or inference regarding the majority's opinion as to the merits of the case).

Respondents conclude that the principal purpose for the exercise of certiorari jurisdiction by this Court is to resolve conflicts between the circuits, and impliedly therefore not within the circuits. However, since this case conflicts with both intra-circuit and extra-circuit authority (as set forth in our Petition) the argument goes nowhere and is pointless.

Respondents characterize one of our "Questions presented for review" as asking this Court to decide whether or not a nonqualified expert may give testimony concerning legal conclusions. However, that is not the case. We simply believe that that is one of the questions presented for review by this matter, and we ask for an opportunity to fully brief this Court and "on the merits" on what we believe to be the correct state of law as regards that matter in the light of this case. Only *then* do we ask this Court to decide whether that rule of law was followed in this case.

Perhaps realizing the correctness of our positions, Respondents characterize the admission of the testimony of Mr. Totten, the nonqualified expert, as being consistent with the "philosophy" (Res. Brief in Opp., page 10) of the Federal Rules of Evidence, Rule No. 704. Such is not enough. The rules are what they are. One individual's interpretation of the "philosophy" behind a particular rule is irrelevant. The rules are very precise, and are meant to be so, in order that unfair, prejudicial, inflammatory and extraneous material will not be injected into the judicial consideration of a claim. That purpose was not accomplished here, however.

Rather than merely having evidence admitted which simply "told" the jury how to decide the case (*see*, Dissent by Justice Kennedy, *Heflin et al. v. Stewart County, Tennessee et al.*, 958 F.2d 709, 719 (6th Cir. 1992)), the Petitioners were entitled to have evidence admitted which was in conformance

with the Federal Rules of Evidence. What Respondents characterize as legally sufficient reasons, and cautionary measures, simply do not avoid the damage which was done by the improper admission of that nonqualified testimony.

It is clear that, unlike Respondents' characterization states, the improper admission of this Totten testimony created a conflict not only with the Sixth Circuit case of *Torres v. County of Oakland*, 758 F.2d 147 (1985), but also with other authorities, to-wit:

(1) The Sixth Circuit case of *McGowan et al. v. Cooper Industries, Inc. et al.*, 863 F.2d 1266 (6th Cir. 1988): "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach. . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." *McGowan, supra*, at 863 F.2d 1272.

(2) The Eighth Circuit case of *Hogan v. American Telephone & Telegraph Co.*, 812 F.2d 409 (8th Cir. 1987), quoted *Torres, supra*, as it observed that the proper analytical focus is whether the evidence is helpful to the fact-finder. *Hogan, supra*, at 812 F.2d 411. That Court further observed that opinion testimony is not helpful to the fact-finder if it is couched as a legal conclusion, again citing *Torres, supra*, and noted that the requirement of "helpfulness" gives assurance against the admitting of opinions which would in essence *tell the fact-finder what result to reach. Hogan, supra*, at 812 F.2d 411.

The *Hogan* Court also cited with approval the earlier case of *Owen v. Kerr McGee Corp.*, 698 F.2d 236 (5th Cir. 1983), for the proposition that a question which asks for a legal conclusion supplies the fact-finder with no information other than that which answers the question of what the witness believes the verdict should be. *Hogan, supra*, at 812 F.2d 411, citing *Owen, supra*, at 698 F.2d 240.

(3) The Second Circuit case of *United States v. Scop et al.*, 846 F.2d 135 (2nd Cir. 1988), cited *Torres, supra*, with approval, for the proposition that testimony containing a legal conclusion is improper and inadmissible because it conveys to the jury the witness' unexpressed, and perhaps erroneous, legal standards. *Scop, supra*, at 846 F.2d 140.

The *Scop* Court's rejection of the expert witness' testimony was based upon an analysis which reasoned that the opinions were calculated to invade the Court's province in determining the applicable law and in instructing the jury as to that law, and therefore they could not have been helpful to the jury in carrying out the jury's legitimate functions. *Id.*, at 846 F.2d 140 (citations omitted).

The conflict of the opinion and result below with the foregoing authorities is thus ripe for correction.

II. AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS CALLED FOR PURSUANT TO UNITED STATES SUPREME COURT RULE NO. 10.

Respondents seek to distract this Court from a proper exercise of its power of supervision pursuant to its own Rule No. 10, by glibly assuring the Court that all that is really at issue here is simply a disagreement of the Petitioners with the "factual finding" of the jury. However, the problem here is not so simple. Rather, the issue here is that liability has been imposed for which there is absolutely no basis.

Respondents effectively argue, in nutshell form, that because they presented self-serving testimony that their decedent could have survived certain lengths of time under various postulated hypothetical scenarios, and because they presented a witness who testified that he thought there had been deliberate indifference, that they are entitled to have this factual finding [sic] affirmed by default, simply through inaction on the part of this Court.

However, in painting this mural, Respondents fail utterly to address the crux of this matter. *The decedent was already*

dead. Unfortunate, yes; tragic, yes; but true. The decedent was dead when he was first discovered, and was examined by several different individuals, each of whom confirmed that he was in fact dead. (*Crutcher*: 1 Trial transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). Yet even before this tragic discovery took place, there had been a *prediscovery* summoning of emergency medical help (1 Trial Transcript at 149:17-19), and thus *even before* the jail official, Deputy Sheriff Larry Joe Crutcher, learned that there was an actual medical emergency (1 Trial Transcript at 148:2-22), he had summoned emergency medical help. This help arrived promptly (2 Trial Transcript at 201:15-202:2) and consisted of two paramedics (2 Trial Transcript at 201:15-202:2) who performed an examination upon the decedent's body (2 Trial Transcript at 202:3-6, 223:1-14). The medical provider, Dr. Lee, arrived shortly thereafter (2 Trial Transcript at 206:10-17).

But, even assuming the evidence was not clear that the decedent was already dead upon discovery, and therefore beyond help, it does not follow that Respondents are entitled to the relief which they have been granted. There was no clearly-established constitutional right extant of a would-be suicide to be immediately cut down upon discovery. *See, Cross v. City of Des Moines et al., supra; Pesek v. City of Brunswick et al., supra; Rich, supra*, at 955 F.2d 1097.

This being the case, the decedent's rights were in no wise violated under any scenario, even those hypothetical ones postulated by Respondents. Since there was no violation of a clearly-established constitutional right which was in existence at the time of the suicide, there was no entitlement to relief. What Respondents' case really distills to is an award on a *de facto* automatic basis, simply because their decedent committed suicide while incarcerated. This central core crux and result, that liability has been imposed where there was no basis whatever for it, is the result which demands the intervention of this Court. This is the basis for certiorari.

Respondents fail to address this aspect of the matter, because there is no answer to it. The rules of this Court mandate that it may exercise its supervisory power in a case such as this, where, as contemplated by Rule 10, a departure has occurred from the usual and accepted course of judicial proceedings as enumerated *supra*; where there is a conflict with decisions of this Court, and where there is a conflict either with decisions of the same circuit, or with decisions of other federal courts of appeal. All of these elements are not, as set forth herein and in our Petition.

CONCLUSION

An overview of Respondents' Brief in Opposition reveals that the position they are advancing at this juncture contains the same flaws which have been present throughout. They have taken a set of tragic facts, but yet a set of facts which gave rise to no liability, and painted upon that set a superstructure of conjecture; it is upon that conjecture that they have demanded relief where there is no liability *ab initio*. The decedent was already dead upon discovery, and the record so shows. (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). *Ex post facto* liability will not undo that tragic fact. There were no constitutional deprivations, and there is no liability.

For the reasons set forth herein and in the Petition for Writ of Certiorari, the Petitioners hereby renew their request for relief as set forth in said Petition.

Respectfully submitted,

Emil F. Sodoro, #13935
Sodoro, Daly & Sodoro
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
(402) 397-6200
Counsel of Record for Petitioners